

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SIETEL SINGH GILL, individually and on behalf
of other similarly situated individuals,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, and NFL
ENTERPRISES LLC,

Defendants.

Case No. 1:21-cv-01032-PAE

RULE 56.1 STATEMENT OF MATERIAL FACTS

In accordance with Federal Rule of Civil Procedure 56 and Local Civil Rule 56.1, Defendants NATIONAL FOOTBALL LEAGUE (the “NFL”), and NFL ENTERPRISES LLC (“NFLE”) (collectively, “Defendants”), by and through their respective attorneys, respectfully submit the following statement of material facts as to which there is no genuine dispute.

The Parties

1. Plaintiff Sietel Singh Gill is and was at all relevant times a resident and citizen of New South Wales, Australia. [Joint Stipulation of Undisputed Facts (“Joint Stip.”)¹, ¶ 1].

2. Defendant NFL is an unincorporated association founded in 1920, the members of which are 32 professional football clubs. The NFL maintains a principal place of business at 345 Park Avenue, New York, NY 10154. [Joint Stip., ¶ 2].

3. Defendant NFLE is a limited liability company organized under the laws of the State of Delaware and maintains a principal place of business at 345 Park Avenue, New York, NY 10154. [Joint Stip., ¶ 3].

¹ See Doc. No. 70.

NFL Game Pass International Subscription

4. NFL Game Pass International² is a digital platform through which subscribers in various markets outside the United States can access and view NFL-related content, including on-demand and live stream access to games throughout the NFL season. See Joint Stip., Ex. D, Doc. No. 70-4, 2013 Subscription Product Terms and Conditions; see also Ex. F, Max Boigon Deposition, p. 11.

5. Subscribers can subscribe to several different NFL Game Pass International packages, which may affect the availability of some services, such as access to the playoffs and Super Bowl. [Joint Stip., Ex. D, Doc. No. 70-4].

6. Each subscription is for a one-year term, which provides subscribers access to the NFL Game Pass International service for the NFL season that falls within the subscription term. See Joint Stip., Ex. D, H, J, Q, Doc. Nos. 70-4, 70-8, 70-10, 70-17; see also Ex. C,³ 2014 Terms and Conditions; Ex. D, 2015 Terms and Conditions; and Ex. E, 2018 Terms and Conditions; see also Declaration of Max Boigon (“Boigon Dec.”), ¶¶ 9-11.

7. Each season’s subscription to the NFL Game Pass International service is subject to Terms and Conditions made available to subscribers. See Joint Stip., Exs. D, H, J, Q, Doc. Nos.

² The name of Plaintiff’s package from 2013-2016 was “Game Pass Season Plus.” The name then changed to “Game Pass Season Plus Pass” starting with the 2017 NFL Season while the right to “manage, operate, offer, and sell Game Pass” was licensed to Perform Media Channels Ltd. See infra ¶ 13. Subsequently, when the license was granted to OverTier Operations for the 2019 NFL Season, the name was changed to “Game Pass Season Pro.” See Boigon Dec., ¶ 4. Hereinafter, when the products are discussed in general or collectively, they will be referred to as “NFL Game Pass International.” The particular names for each given season will be used when discussing Plaintiff’s particular subscriptions for those seasons.

³ References to “Ex. ___” are to the exhibits to the accompanying Declaration of Thomas A. Leghorn.

70-4, 70-8, 70-10, 70-17; see also Ex. C, 2014 Terms and Conditions; Ex. D, 2015 Terms and Conditions; and Ex. E, 2018 Terms and Conditions.

NFL Game Pass International Contracts

8. During the 2013 NFL Season, the NFL Game Pass International service was provided by NFLE, through a third-party vendor/operator called NeuLion. [Joint Stip, ¶¶ 6-7].

9. NFLE, through its operator NeuLion, provided NFL Game Pass International each season until the 2017 NFL Season. [Joint Stip., ¶ 8].

10. Individual terms and conditions were issued for these seasons which indicated that NeuLion was operating NFL Game Pass International. See, e.g., Joint Stip., Ex. D, Doc. No. 70-4 (“We have contracted with a third party (currently NeuLion, Inc.) to operate the above listed subscription product, on our behalf.”).

11. Between the 2016 and 2017 NFL Seasons, responsibility for NFL Game Pass International subscriptions shifted from NFLE and NeuLion to licensees of NFL International LLC (“NFLI”), an affiliate of NFLE. See Ex. F., Max Boigon Deposition, p. 12.

12. Starting with the 2017 NFL Season, NFL Game Pass International began being offered to the Australian Market by a third-party licensee of NFLI called Perform Media Channels Ltd. (“Perform”). [Joint Stip. Ex. A, Doc. No. 70-1, April 10, 2017 Product Development and Media Rights Agreement].

13. On April 10, 2017, NFLI and Perform entered into a license agreement by which “NFLI grants to Perform the non-transferable right and license and Perform accepts the obligations, during the GP Term and throughout the GP Territory to manage, operate, offer and sell Game Pass as a standalone subscription offering and distribute GP Content solely within Game Pass running on Approved Devices.” [Joint Stip. Ex. A, Doc. No. 70-1, p. 10].

14. Australia was within the GP Territory within which Perform was licensed to manage, operate, offer and sell Game Pass International as of April 10, 2017. [Joint Stip., Ex. A, Doc. No. 70-1, p. 6].

15. On June 18, 2018, NFLI and OverTier Operations entered into a license agreement by which “NFLI grant[ed] to [OverTier Operations] the non-transferable right and license, and [OverTier Operations] accept[ed] the obligation, during the Term and throughout the territory to offer, market and sell Game Pass as a standalone subscription offering and distribute GP Content solely within Game Pass running on Approved Devices.” The license encompassed international territories, including throughout Europe, but did not include Australia at the time. [Joint Stip., Ex. B, Doc. No. 70-2, p. 6, Exhibit A].

16. On April 1, 2019, NFL International Licensing Inc. (“NFLILI”), an affiliate of NFLI that took over the role of licensing NFL Game Pass International, entered into an amended license agreement with OverTier Operations (the “2019 Amended Agreement”), which stated in part “[OverTier Operations] hereby confirms and agrees that it provided its consent for NFL International LLC to transfer and assign all of its rights and obligations under the Agreement to NFLILI, effective as of January 1, 2019. For the avoidance of doubt, all references to NFLI in the Agreement will be read and construed as references to NFLILI.” [Joint Stip., Ex. C, Doc. No. 70-3, p. 1].

17. The 2019 Amended Agreement expanded OverTier Operation’s territory over the NFL Game Pass International service to include Australia for the 2019 NFL Season. [Joint Stip., Ex. C, Doc. No. 70-3, Exhibit A].

18. Accordingly, starting with the 2019 NFL Season, OverTier Operations was, and to the present remains, the exclusive licensee of NFLILI authorized to manage, operate, offer and sell

the NFL Game Pass International subscription service in Australia. See Joint Stip., Ex. C, Doc. No. 70-3.

Gill's Subscription to NFL Game Pass International

The 2013 NFL Season

19. The Terms and Conditions applicable to the NFL Game Pass International subscription service for the 2013 NFL Season (the “2013 Terms and Conditions”) went into effect on June 8, 2012 and were updated on July 29, 2013. [Joint Stip., Ex. D, Doc. No. 70-4].

20. The 2013 Terms and Conditions stated, in part, “For Subscription Products billed on an annual basis (e.g., NFL Game Pass – Season Plus Subscription, NFL Game Rewind – Season Plus Subscription) the term begins when you purchase and ends before the start of the following year’s NFL Preseason (approximately July 31), with one-time billing immediately following your purchase.” [Joint Stip., Ex. D, Doc. No. 70-4].

21. The 2013 Terms and Conditions stated, in part, “We have contracted with a third party (currently, NeuLion, Inc.) to operate the above listed Subscription Product, on our behalf.” [Joint Stip., Ex. D, Doc. No. 70-4].

22. On or around September 10, 2013, Gill purchased the Game Pass Season Plus package for the 2013 NFL Season. This was Gill’s first time subscribing to NFL Game Pass International. Joint Stip., Ex. E, Doc. No. 70-5; Ex. G, Sietel Singh Gill Deposition, pp. 6-7.

23. Gill’s subscription for the 2013 NFL Season was governed by the 2013 Terms and Conditions, to which he agreed. See Joint Stip., ¶ 15; Joint Stip., Ex. D., Doc. No. 70-4.

24. The September 10, 2013 email from nflgamepass@neulion.com informed Gill that his 2013 Game Pass Season Plus subscription “will end at 11:59 pm GMT on 31 Jul 2014.” [Joint Stip., Ex. E, Doc. No. 70-5].

25. Gill's subscription for the 2013 NFL Season was for a one-year term that expired on July 31, 2014, prior to the start of the 2014 NFL Season. [Joint Stip., Exs. D, E, Doc. Nos. 70-4, 70-5].

26. During his deposition, Max Boigon of NFL International Licensing Inc. testified that the Terms and Conditions for Game Pass would not be renewed:

Q: Let me restate that. What does a person need to do in order to have this allegedly one year or seasonal agreement renew for another season?
A: It can – this – the terms of service cannot be renewed for another season. They are only for a single season.

Ex. F, Max Boigon Deposition, p. 63.

27. Boigon clarified that "payment will renew but the terms of service will not. The terms of service are a single year, seasonal – annual." Ex. F, pp. 60-61.

The 2014, 2015, and 2016 NFL Seasons

28. Gill elected to auto-renew his Game Pass Season Plus subscription for each of the 2014, 2015 and 2016 seasons and, thereby, entered into three separate and distinct one-year subscriptions for Game Pass Season Plus for each of those respective NFL seasons. See Ex. G, Sietel Singh Gill's Deposition, p. 24; Ex. F, Max Boigon Deposition, pp. 63-64; see also Ex. C, 2014 Terms and Conditions; Ex. D, 2015 Terms and Conditions; Joint Stip., Ex. F, Doc. No. 70-6, Gill Credit Card Statement.

29. Data relating to Gill's subscriptions, referred to within the Declaration of Max Boigon, reflects that his subscription for the 2014 NFL Season ran from August 1, 2014 to August 1, 2015, that his subscription for the 2015 NFL Season ran from August 7, 2015 to August 1, 2016, and that his subscription for the 2016 NFL Season ran from August 5, 2016 to August 1, 2017. Boigon Dec., ¶¶ 9-11 and Exhibit A, Subscription Order Tab, Columns U, AH and Al.

The 2017 NFL Season

30. Gill did not auto-renew his subscription to Game Pass Season Plus Pass for the 2017 NFL Season. See Boignon Dec., ¶ 12.

31. Rather, Gill manually registered on September 10, 2017 for a seven-day free trial period of Game Pass Season Plus Pass. See Boigon Dec., ¶¶ 12-13. Following the completion of that trial period, his credit card was charged for the 2017 Game Pass Season Plus Pass subscription on September 17, 2017. See Boigon Dec., ¶¶ 12-13.

32. Gill's subscription for the 2017 NFL Season was governed by the Terms and Conditions applicable to the 2017 NFL Season (the "2017 Terms and Conditions"). [Joint Stip., Ex. H, Doc. No. 70-8]; see also Ex. F, Max Boigon Deposition, p. 63.

33. The 2017 Terms and Conditions state in part, "These Subscription Terms and Conditions are between you and NFL International LLC." [Joint Stip., Ex. H, Doc. No. 70-8].

34. Gill's subscription to Game Pass Season Plus Pass for the 2017 NFL Season was, like his prior subscriptions, for a one-year term for that particular season. See [Joint Stip., Ex. H, Doc. No. 70-8]. The records referred to in the Boigon Declaration show that Gill purchased a subscription for the 2017 NFL Season running from September 10, 2017 through August 1, 2018. See Boigon Dec., Exhibit A, Subscription Order Tab, Columns U, AH and AL.

The 2018 NFL Season

35. Gill also did not auto-renew his subscription to Game Pass Season Plus Pass for the 2018 NFL Season. See Boignon Dec., ¶ 14.

36. Rather, Gill manually paid for Game Pass Season Plus Pass for the 2018 NFL Season with a credit card on August 1, 2018. See Boignon Dec., ¶ 15.

Gill's subscription for the 2018 NFL Season was, like each of his prior subscriptions, for a one-year term. See Ex. E, 2018 Terms and Conditions ("For versions of the Product which are

billed on a seasonal or annual basis (e.g., NFL Game Pass (International) - Season Plus Subscription) ('Season Plus'), the term begins when you purchase a subscription to the Product and ends before the start of the following year's NFL Preseason (approximately July 31)."'). The records of Gill's subscriptions show that that Gill purchased a subscription for the 2018 NFL Season running from August 1, 2018 through August 1, 2019. See Boigon Dec., Exhibit A, Subscription Order Tab, Columns U, AH and Al.

37. Gill's subscription for the 2018 NFL Season was "between [Gill] and NFL International LLC." Ex. E.

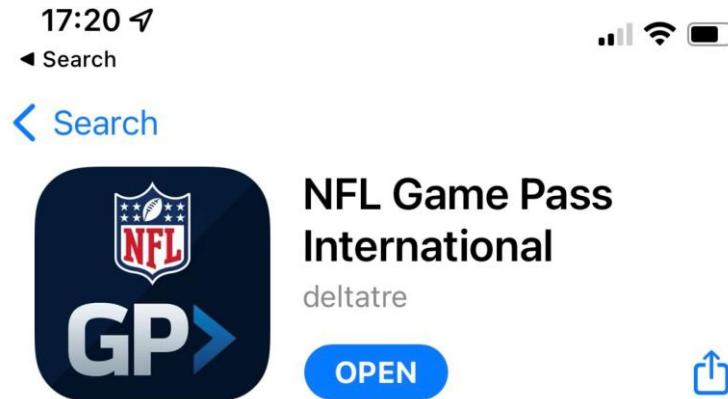
38. On November 4, 2018, Gill submitted a web form ticket reporting a technical issue he had with his Game Pass Season Plus Pass service. Within his report, Gill stated he had "a paid membership till mid-2019 with NFL Gamepass." [Joint Stip., ¶ 24].

The 2019 NFL Season

39. On June 19, 2019, Gill received an email from OverTier Operations regarding the changes to the NFL Game Pass International subscription service for the upcoming 2019 NFL Season. [Joint Stip., Ex. I, Doc. No. 70-9].

40. The June 19, 2019, email stated in part, "This offseason we're updating our service provider as part of our commitment to providing a premium NFL experience to our fans around the world." The email continued, stating "Please note on July 25, 2019 your existing app(s) will no longer be in operation so please update before then." The email contained a footer which stated in part, "For further details on NFL Game Pass International Terms and Conditions, including billing, please click here." Underneath the link to the Terms and Conditions was OverTier Operations' name and P.O. Box information. [Joint Stip., Ex. I, Doc. No. 70-9].

41. A screen shot of the new NFL Game Pass International app references "deltatre":



Ex. H, DEF0001393.

42. The Terms and Conditions that were hyperlinked in the June 19, 2019 email were for subscriptions to the then upcoming 2019 NFL Season and stated, in part, “Who we are. Overtier Operations who is the official licensee of the content material and Deltatre S.p.A. who operates the platform and deals with customer queries. As a customer you are contracted with both entities.” [Joint Stip., Ex. J, Doc. No. 70-10, p. 1].

43. These 2019 Terms and Conditions additionally set forth that, “The governing law and the competent jurisdiction are the one of the country where the consumer has his habitual residence.” [Joint Stip., Ex. J, Doc. No. 70-10, p. 8].

44. Moreover, the 2019 Terms and Conditions set forth that “[f]or any subscription product bought online you have a legal right to change your mind within 14 days and receive a refund.” [Joint Stip., Ex. J, Doc. No. 70-10, p. 4; see also Ex. Q, Doc. No. 70-17, p. 4].

45. These Terms and Conditions also set forth that OverTier’s and Deltatre’s “maximum aggregate liability for all proven losses, damages and claims arising out of or in connection with these terms or a supply under these terms, including liability for breach, in

negligence or in tort or for any other common law or statutory action, is limited to the sum of \$100.” [Joint Stip., Ex. J, Doc. No. 70-10, p. 7].

46. Plaintiff testified that he has not undertaken any search for Terms and Conditions applicable to the 2019 NFL Season other than the 2019 Terms and Conditions referenced above. See Ex. G, Sietel Singh Gill Deposition, pp. 56-58:

Q: Do you have any document that embodies a contract between you and either the NFL or NFL Enterprises for the provision of Game Pass to you in Australia?

A: I do not know.

...

Q: Have you looked for one? Have you undertaken a search for any such document?

...

A: [D]o I have a document that says that I was clearly in a direct contract for the provision of Game Pass with NFL Enterprises? I've not looked for that.

47. The email account associated with Gill opened the June 19, 2019 email twice on the day it was received, at 11:45 A.M. and 12:29 P.M., as described by Richard Johnston, Chief Finance Officer of OverTier Operations. Johnston Aff., ¶ 18.

48. On July 1, 2019, Gill received another email from OverTier Operations. [Joint Stip., Ex. K, Doc. No. 70-11].

49. The July 1, 2019 email stated in part, “As a reminder from our previous email, we’re updating our service provider as part of our commitment to providing a premium NFL experience to our fans around the world.” The email continued, stating in part, “we wanted to let you know that your NFL Game Pass subscription is set to auto-renew in 31 days. Your subscription fee will be billed on or around August 1, 2019 at the same 2018 Season Plus full price in your market, 274.99 AUD.” The email continued on, stating in part, “Click here to update your payment preferences/details. However, if you wish to cancel your subscription, you can manage your

preferences here.” The email also contained a footer which stated in part, “For further details on NFL Game Pass International Terms and Conditions, including billing, please click here.” Following the link to the Terms and Conditions was OverTier Operations’ name and P.O. Box information. [Joint Stip., Ex. K, Doc. No. 70-11].

50. The Terms and Conditions that were hyperlinked in the July 1, 2019 email for the upcoming 2019 NFL Season were the same Terms and Conditions hyperlinked to the June 19, 2019 email. [Joint Stip., Ex. J, Doc. No. 70-10].

51. The email account associated with Gill opened the July 1, 2019 email at 2:42 P.M. on the day it was received. Johnston Aff., ¶ 19.

52. On July 16, 2019, Gill received another email from OverTier Operations. [Joint Stip., Ex. L, Doc No. 70-12].

53. The July 16, 2019 email stated in part, “With the NFL preseason kicking off in less than 3 weeks time, we wanted to remind you that you will need to update your app(s) in order to watch the action this season. As previously shared, you will have until July 25, 2019 to update your existing NFL Game Pass app(s).” The bottom of the email stated in part, “For further details on NFL Game Pass International Terms and Conditions, including billing, please click here.” Following the link to the Terms and Conditions was OverTier Operations’ name and P.O. Box information. [Joint Stip., Ex. L, Doc No. 70-12].

54. The Terms and Conditions that were hyperlinked in the July 16, 2019 email for the upcoming 2019 NFL Season were the same Terms and Conditions hyperlinked to the June 19, 2019 email. [Joint Stip., Ex. J, Doc. No. 70-10].

55. The email account associated with Gill opened the July 16, 2019 email first at 11:46 A.M. on the day it was received and then again at 12:02 A.M. on the following day, July 17, 2019. Johnston Aff., ¶ 20.

56. The billing system used by OverTier reflected, for Gill, “New Subscription Created” on 06/05/2019 and “Renewal,” on 08/02/2019. [Joint Stip., ¶ 33; Joint Stip., Ex. N, Doc. No. 70-14].

57. On August 2, 2019, Gill received an automatically generated email stating, “your NFL Game Pass subscription has been processed on 08/02/2019...Sincerely, NFL Game Pass.” [Joint Stip., Ex. M, Doc. No. 70-13].

58. On August 28, 2019, Gill received an email from OverTier Operations. [Joint Stip., Ex. O, Doc. No. 70-15].

59. The August 28, 2019 email stated in part, “Your Season Pro subscription will run until 1st August 2020 where you will have access to the entire NFL season at your fingertips.” The email continued, stating, “For further details on NFL Game Pass International Terms and Conditions, including billing, please click here.” Following the link to the Terms and Conditions was a hyperlink with the text “Want to unsubscribe or change your details?” After that, the email included OverTier Operations’ name and P.O. Box information. [Joint Stip., Ex. O, Doc. No. 70-15].

60. The email account associated with Gill opened the August 28, 2019 email at 10:54 P.M. on the day it was received. Johnston Aff., ¶ 22.

61. On October 29, 2019, Gill received an email from OverTier Operations. [Joint Stip., Ex. P, Doc., No. 70-16].

62. The October 29, 2019 email began with the heading “**Updates to Terms and Conditions**” followed by a message stating in part, “We are writing to let you know about updates we are making to our Terms and Conditions. These updates apply to all existing NFL Game Pass Australian subscribers only and take effect on October 29, 2019. We invite you to please review the new Terms and Conditions in full here.” The email continued, stating “If you continue to use our products and services on or after October 29, 2019, you are agreeing to the updated Terms and Conditions.” The bottom of the email stated in part, “For further details on NFL Game Pass International Terms and Conditions, including billing, please click here.” Following the link to the Terms and Conditions was OverTier Operations’ name and P.O. Box information. [Joint Stip., Ex. P, Doc., No. 70-16].

63. The updated 2019 Terms and Conditions that were hyperlinked to the October 29, 2019 email included changes to Clause 14 to ensure compliance with certain Australian marketing laws. [Joint Stip., Ex. Q, Doc. No. 70-17, p. 8].

64. Clause 2.1 of the updated 2019 Terms and Conditions remained the same as the earlier 2019 Terms and Conditions, stating “Who we are. Overtier Operations who is the official licensee of the content material and Deltatre S.p.A. who operates the platform and deals with customer queries. As a customer you are contracted with both entities.” [Joint Stip., Ex. Q, Doc. No. 70-17, p. 1].

65. The email account associated with Gill opened the October 29, 2019 email at 11:06 A.M. on the day it was received. Johnston Aff., ¶ 23.

66. Gill testified at his deposition that he did not recall accessing a hyperlink in 2019 to review any new terms and conditions for Game Pass. Ex. G, Sietel Singh Gill Deposition, p. 53.

67. However, the email account associated with Gill opened each and every one of the above-described emails, sometimes more than once, as described by Richard Johnston, Chief Finance Officer of OverTier Operations. See Johnston Aff. ¶¶ 18-20, 22-23.

68. The Super Bowl for the 2019 NFL season took place on February 2, 2020 in Miami, Florida and the live stream of the Super Bowl was provided by OverTier and Deltatre as part of Gill's subscription to Game Pass Season Pro for the 2019 NFL Season. See Joint Stip., Exs. J, Q, Doc. Nos. 70-10, 70-17].

69. Plaintiff filed the First Amended Class Action Complaint on April 30, 2021. Ex. A.

70. Defendants answered the Amended Complaint on December 7, 2021. Ex. B.

Dated: New York, New York
May 16, 2022

Respectfully submitted,

LONDON FISCHER LLP

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